

FSM State-National
Meeting to consider
the Judiciary
Joy Island, Pohnpei
September 29, 1986

PROPOSED OVERVIEW FOR CONSIDERATION IN PREPARING FOR
MEETING OF FSM LEADERS CONCERNING FUTURE OF THE JUDICIARY

- I. Mission of a court system within a nation
 - A. Provide stability and continuity
 - B. Articulate and apply societal values
 - C. Resolve disputes
 - 1. Defuse conflicts
 - a. Intergovernment
 - b. Intragovernment
 - c. Private person versus government
 - d. Private persons
 - 2. End impasse and permit action
 - D. Provide just and understandable results
 - E. Build confidence in system
 - F. Make economic development possible
- II. The adversary system
 - A. Dangers

1. Forces confrontation
2. Complex may seem artificial
3. Rigid - not conducive to "splitting the difference"
4. Treats all alike - difficult to display special respect for traditional or other leaders

B. Strengths

1. Fair procedures
2. Predictable Rules
3. Provide a solution to irreconcilable disputes
4. Treats all alike -- does not show favoritism on basis of titles or power

C. Possible Advantages to be gained by seeking Alternatives

1. Soften discussion process, reduce tension levels
2. Greater possibility of compromise
3. Build agreement, rather than forced solution
 - a. Parties commit themselves
 - b. Parties implement
4. Possible alternative forms
 - a. Mediation
 - b. Conciliation
 - c. Arbitration
 - d. Mini-Trial

5. Directions for the Future

- a. Strong adversary system?
- b. Alternative systems for resolving disputes

III. Judicial Independence

A. What does it mean? Judges and judiciary should be sufficiently independent of other parts of government so that decisions may be made without concern that a particular decision may result in loss of the judge's income or position, or administrative harassment of the judiciary.

B. How is it accomplished?

1. Insulate Judges

- a. Compensation, FSM Const. art. XI, § 5.
- b. Tenure, FSM Const. art. XI, § 3.

2. Insulate Judiciary. Judiciary must have within itself the capacity to assure that it can carry out its constitutional functions.

a. Statement of Committee on Governmental Structure, SCREP No. 36, II J. of Micro. Con.

Con. 848-49:

"It is important that all provisions assuring the independence of the judiciary from the other two branches of government be given constitutional status rather than be left to the legislature for later provision....[O]nce the new government is established and begins to function, matters important to the judiciary may

be given low priority. This tendency to give lower priority to legislation relating to the judiciary has been documented in the United States, and is not surprising when one remembers that legislators have limited time in which to act on a larger number of the matters which are often of greater immediate importance to their constituents. It is for this reason that the committee recommends giving the High Court both administrative responsibility and broad rule-making power rather than leaving such matter to the legislature...

[Your] Committee feels that the best way to assure equal justice is to guarantee that the judicial branch of government is truly independent from the other two branches of government on all levels."

b. Statement of Committee on Government

Functions, SCREP No. 49, II J. of Micro. Con.

Con. 896:

"There appears to be a general consensus in the Convention that this Constitution should establish a bare skeleton of government with detail to be supplied by national legislation. In principle, your Committee agrees with this approach. However, with respect to establishment of one of the three branches of the government, the judicial branch, your Committee feels that greater detail is necessary to safeguard separation of powers and the independence of the judiciary."

The independence of the judicial branch should not be undermined by allowing such important matters as jurisdiction, appointment of judges, their removal, rule-making power and administrative control of the judiciary to be decided by the legislature. For this reason, your

Committee has included in the proposal those matters relating to the judiciary which we believe should be included in the Constitution in order not only to maintain the independence of the judiciary, but also to prevent as much as possible the tendency experienced to date to give lower priority to matters relating to the judiciary.

c. Rule-making Powers. FSM Const. art. XI, §

9:

"The Chief Justice shall make and publish and may amend rules governing national courts, and by rule may:

(a) divide the inferior national courts and the trial division of the Supreme Court into geographical or functional divisions;

(b) assign judges among the divisions of a court and give special assignments to retired Supreme Court justices and judges of state and other courts;

(c) establish rules of procedure and evidence;

(d) govern the transfer of cases between state and national courts;

(e) govern the admission to practice and discipline of attorneys and the retirement of judges; and

(f) otherwise provide for the administration of the national judiciary. Judicial rules may be amended by statute."

d. Administrative Control. FSM Const., art. XI, § 9. "The Chief Justice is the chief administrator of the national judicial system and

may appoint an administrator who is exempt from civil service." FSM Const. art. XI, § 9.

1. Personnel
2. Budget
3. Finance

IV. Establishment of FSM Jurisprudence and Method of Analysis

A. The Judicial Guidance Clause. FSM Const. art. XI, §

11.

1. "The Constitution's Judicial Guidance Provision...identifies as our guiding star, not the Restatement or decisions of the United States courts concerning the common law, but the fundamental principle that our decisions must be 'consistent' with the 'Constitution, Micronesian customs and tradition and the social and geographical configuration of Micronesia'".

Rauzi v. FSM, 2 FSM Intrm. 8 (Pon. 1985).

2. "The Judicial Guidance Clause was intended to have pervasive effect on the decisionmaking of the Court. This clause was the effort by the drafters to assure that judges would recognize that the Constitution represents the aspirations of the People of Micronesia to exercise our inherent sovereignty, to affirm our common wish to live together in peace and harmony, to preserve the heritage of the past and 'to protect the promise of the future,' by becoming 'the proud guardian of our own islands; now and forever.' FSM Const., Preamble."

"The clause places affirmative obligations upon an FSM Supreme Court justice in every case that comes before this Court. Our decisionmaking must be grounded upon a 'new basis which will allow consideration of the pertinent aspects of Micronesian society and culture.'"

Semens v. Continental Air Lines, Inc., 2 FSM Intrm. 131,
139 (Pon. 1985).

3. "Of course, this Court can and should consider decisions and reasoning of courts in the United States and other jurisdictions, including the Trust Territory courts, in arriving at its own decisions. What is clear from the Constitution, however, is that we are not to consider ourselves bound by those decisions and must not fall into the error of adopting the reasoning of those decisions without independently considering suitability of that reasoning for the Federated States of Micronesia."

Alaphonso v. FSM, 1 FSM intrm. 209, 213 (App. 1982).

B. Custom and Tradition

1. "[F]amily relationships are highly valued throughout Micronesia. Familiar relationships are at the very core of Micronesian society and are the source of numerous rights and obligations which influence practically every aspect of the lives of individual Micronesians. These relationships are an important segment, perhaps the most important component, of the custom and tradition referred to generally in the Constitution, Article V, and more specifically in the National Criminal Code, Sections 108 and 1003."

FSM v. Ruben, 1 FSM Intrm. 34 (Truk 1981).

2. "Congress has set aside the previous assumption that customary law must always yield to specific statutory provisions. The National Criminal Code holds out the possibility that, in appropriate circumstances, unwritten customary law may assume importance equal to, or greater than, particular written provisions in the National Criminal Code. This Court has the affirmative obligations to 'recognize and consider' customs relating to crimes

and criminal liability and to determine the 'applicability and effect of customary law in a criminal case.'"

FSM v. Mudong, 1 FSM Intrm. 135 (Pon. 1982).

3. "Ponapean customary law flows from an island tradition of interdependence and sharing. It de-emphasizes (compared to the constitutional legal system) notions of individual guilt, rights and responsibility, and places greater stress on the groups to which the individual accuseds and victims belong....in relative harmony."

Mudong, 1 FSM Intrm. at 144-45.

4. "...The Constitution of the Federated States of Micronesia, at Article V, refers directly to traditional rights and traditional leaders. Under the Constitution and statutes enacted by the Congress of the Federated States of Micronesia (e.g., the National Criminal Code, 11 FSM Code §§108 and 1003), custom and tradition have a special place and may demand special consideration.

In short, the constitutional

government seeks not to override custom but to work in cooperation with the traditional system in an atmosphere of mutual respect." In re Iriarte (I), 1 FSM Intrm. 239 (Pon. 1983).

C. Constitutional Interpretation

1. When the words are clear.

a. "Interpretation must begin with the words of the Constitution."

Alaphonso v. FSM, 1 FSM Intrm. 209, 214 (App. 1982).

b. "If the Constitutional language is absolutely clear and amenable to only one possible interpretation, then the Court must accept that and may go no further in its quest for meaning.

Of course, the particular provision must be read against the background of the entire Constitution. Review of other provisions properly may strengthen or weaken the firmness of conviction with which a reader perceives the meaning of a given clause or provision."
Innocenti v. Wainit, 2 FSM Intrm. 173, 175 (Pon. 1985).

c. "Constitutional interpretation must start and end with the words of the provision when the words themselves plainly and unmistakably provide the answer to the issue posed."

Ponape Federation of Cooperative Associations
v. FSM, 2 FSM Intrm. 124, 126 (Pon. 1985).

2. When words of the Constitution do not
supply a compelling answer

a. "After careful consideration of the words themselves, the next step is to review the Journal of the Constitutional Convention to locate any discussion in the Constitutional Convention about the provision and to learn what the framers had in mind when they adopted the provision."

FSM v. Tipen, 1 FSM Intrm. 79, 83 (Pon. 1982).

b. "...If doubts still remain, we should normally proceed to other sources such as interpretations of similar language in the United States Constitution, decisions in the Trust Territory High Court, generally held notions of justice within the international community, and consideration of the law of other specific nations, especially others within the Pacific community. Id.

3. The Constitution's Declaration of Rights

a. "...the Constitutional Journal of the Constitutional Convention reveals the United States Constitution as the historical precedent for most provisions in the Declaration of Rights."

Alaphonso v. FSM, 1 FSM Intrm. 209, 214 (App. 1982).

b. "...we may not follow blindly decisions of the United States or other courts. This cautionary note should be kept in mind even in...constitutional interpretation of provisions within the Declaration of Rights. Before accepting an interpretation of United States courts concerning the meaning of the words in this Constitution, we must review the reasoning of those courts and determine whether that reasoning and the results reached are suitable for the Federated States of Micronesia."

Alaphonso v. FSM, 1 FSM Intrm. 209, 219 (App. 1982).

4. Where the FSM Constitutional Provision Differs from that in the United States Constitution.

"We may not approach this clause with a presumption that interpretation of the United States Constitution by United States Courts will yield a correct result. Instead, we must recognize that such a clause presumably represents a conscious effort by the framers to select a road other than that paved by the United States Constitution. Our interpretative efforts here then must focus on the language of the clause. If the language is inconclusive our tentative conclusion may be tested against the journals of the Micronesian Constitutional Convention and the historical background against the journals of the Micronesian Constitutional Convention and the historical background against which the clause was adopted."

Tammow v. FSM, 2 FSM Intrm. 53, 57 (App. 1985).

V. Summary of Cases Decided

A. Civil Cases

1. Number of Cases
2. Types of Cases

- B. Criminal Cases
 - 1. Number of Cases
 - 2. Types of Cases
 - 3. Sentencing Procedures - Justice Ombudsman
 - a. Always a Punishment
 - b. Alternatives to Imprisonment

VI. Accomplishments

- A. Decisions
 - 1. Timing
 - 2. Explanation of reasons
 - 3. Establishment of Micronesian jurisprudence
- B. Research system
 - 1. Interim Reporters
 - 2. Digest
 - 3. Updater
- C. Statistics and reports
 - 1. Litigation
 - 2. Prisoners
- D. Library and physical plant
- E. Judicial administration
- F. Judicial seminars
- G. Legal Education
- H. Symbols
 - 1. Robe
 - 2. Seal

VII. Structural problems with current system

A. Interchangability between trial and appellate judges; not enough appellate work for anyone court to become specialized.

B. Several tiers of appeal. Losses to litigants and society.

1. Added expenses

2. Time consuming

3. Delay in final decisions

C. Divisive structure - courts could be lured into seeing themselves as linked closely with government after which they are named. Become advocates, appearance of progovernment bias. Jurisdictional issues.

D. Jurisdictional issues.

E. Administrative cooperation hampered.

F. Too much expertise required? Much is asked of each judge:

1. Trial judge

2. Appellate judge

3. Administrator

G. Institutional expense. Each court must maintain its non appellate system.

VIII. Possible solutions

A. Greater specialization of judges

B. Integration

C. Efficiency

D. Reduce jurisdictional conflicts

E. Bolster judicial credibility

1. Independence
 2. Minimize policy and advocacy role
 3. Retirement
- IX. Steps needed to accomplish solutions
- A. National trial courts
 - B. Move trial functions toward judges appointed and confirmed by states
 - C. Centralized appellate functions
 - D. Separate personnel and finance systems
- X. Physical plant
- A. Truk
 - B. Kosrae
- XI. A Micronesian Chief Justice
1. Desirable qualities
 2. Possible sources
 - a. Statesmen
 - b. State court judges
 - c. FSM citizen attorneys
 3. Timing